



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

(C-29A)

October 16, 1997

The Honorable Edward J. Kuhlmann  
Administrative Law Judge  
U.S. Environmental Protection Agency  
Mail Code 1900  
401 M Street, S.W.  
Washington, D.C. 20460

Re: The Marion Steel Company, Marion, Ohio.  
Docket No. TSCA-V-C-87-93.

Dear Judge Kuhlmann:

Enclosed please find a copy of Complainant's Provision of Supplemental Authorities which I filed today with the Regional Hearing Clerk pursuant to your Order, dated September 25, 1997. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Trevino", written over a circular stamp or mark.

Jeffery M. Trevino  
Associate Regional Counsel

Enclosure

cc: Regional Hearing Clerk  
Region 5  
U.S. Environmental Protection Agency

Stephen P. Samuels, Esq.  
Samuels and Northrop Co., LPA  
Suite 816  
180 East Broad Street  
Columbus, OH 43215

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of )

Marion Steel Company, Marion, Ohio, )

Respondent. )

) Docket No. TSCA-V-C-87-93.

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U.S. ENVIRONMENTAL  
PROTECTION AGENCY  
REGION V

**COMPLAINANT'S PROVISION OF SUPPLEMENTAL AUTHORITIES**

Complainant, the Director, Waste Pesticides and Toxics Division, Region 5, United States Environmental Protection Agency, ("U.S. EPA"), by and through his attorney, Jeffery M. Trevino, Associate Regional Counsel, hereby provides supplemental authorities to support its arguments for this civil administrative action pursuant to the Order of the Court, dated September 25, 1997.

On September 30, 1997, the Environmental Appeals Board, United States Environmental Protection Agency, ("EAB"), issued its Final Decision and Order for Lazarus, Inc., Columbus, Ohio, Docket No. TSCA-V-C-32-93. Lazarus, Inc., TSCA Appeal No. 95-2 (EAB Sep. 30, 1997). The EAB affirmed the Initial Decision of Judge Harwood, dated May 25, 1995, and held, *inter alia*:

1. Lazarus' assertion of its "public protection" defense pursuant to the Paperwork Reduction Act, 44 U.S.C. § 3512, ("PRA"), was late, but caused no delay to the proceedings or prejudice to the Region. Therefore, the Presiding Officer did not err in finding Respondent asserted timely its "public protection" defense pursuant to the PRA. Lazarus, Inc., TSCA Appeal No. 95-2, slip. op. at 24 (EAB Sep. 30, 1997);
2. A PCB annual document pursuant to 40 C.F.R. § 761.180(a) is an "information

collection request.” Therefore, the Presiding Officer did not err in finding that after December 31, 1981, the “public protection” defense of the PRA is applicable to the regulatory requirement to prepare a PCB annual document pursuant to 40 C.F.R. § 761.180(a); Lazarus, Inc., TSCA Appeal No. 95-2, slip. op. at 37 and 38 (EAB Sep. 30, 1997);

3. There was no “display” of the Office of Management and Budget (“OMB”) control number for the regulation at 40 C.F.R. § 761.180(a) until 1986. Therefore, the Presiding Officer did not err in finding that the “public protection” defense of the PRA is applicable to and prohibits the assessment of penalties for failure to prepare PCB annual documents in violation of 40 C.F.R. § 761.180(a) for calendar years 1981-1984; Lazarus, Inc., TSCA Appeal No. 95-2, slip. op. at 42 and 43 (EAB Sep. 30, 1997);

4. The 1986 publication in the Federal Register of the OMB control number for 40 C.F.R. § 761.180(a) failed to provide any record of any initial notice providing detailed information or identification of the regulations involved in violation of the opinion of the General Counsel of OMB, dated May 26, 1993. Therefore, the Presiding Officer did not err in finding that the “public protection” defense of the PRA is applicable to and prohibits the assessment of penalties for failure to prepare PCB annual documents in violation of 40 C.F.R. § 761.180(a) for calendar years 1985-1988. Lazarus, Inc., TSCA Appeal No. 95-2, slip. op. at 56 (EAB Sep. 30, 1997);

5. The first “display” of the OMB control number for the regulation at 40 C.F.R. § 761.180(a) occurred at the time of the December 1989 Federal Register notice. Therefore, U.S. EPA may not recover penalties for violations of the PCB annual document requirements due prior to December 1989. This holding covers the annual document requirements for calendar

years 1985-1988. Lazarus, Inc., TSCA Appeal No. 95-2, slip. op. at 56 (EAB Sep. 30, 1997).

Therefore, the EAB has stated unequivocally U.S. EPA may not recover penalties for a violation of the PCB annual document requirement of 40 C.F.R. § 761.180(a) if the PCB annual document was due before December 1989. Therefore, since Count IV of the Complaint alleges Respondent failed to develop and maintain complete records and complete annual documents for calendar years 1983-1988, which were all due before December 1989, this Court can grant any part of Respondent's Motions to dismiss or strike Count IV of the Complaint, and Complainant hereby withdraws Count IV of its Complaint and reduces the proposed civil penalty of its Complaint by \$9,000.00 from \$62,500.00 to \$53,500.00.

However, the EAB has also stated unequivocally U.S. EPA may recover penalties for a violation of the PCB annual document requirement of 40 C.F.R. § 761.180(a) if the PCB annual document was due after December 1989. Therefore, since Counts I, II, and III of the Complaint allege Respondent failed to develop and maintain complete records and complete annual documents for respective calendar years 1991, 1990, and 1989, which were due respectively on July 1, 1992, July 1, 1991, and July 1, 1990, this Court cannot grant any part of Respondent's Motions which seek to dismiss or strike Counts I, II, and III of the Complaint.

Wherefore, Complainant requests that this Court rule accordingly on all outstanding motions for this civil administrative action.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Trevino', with a large circular flourish at the end.

Jeffery M. Trevino  
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Office of Regional Counsel  
Region 5  
U.S. Environmental Protection Agency  
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ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

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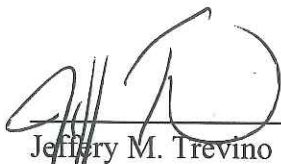
Respondent. )

CERTIFICATE OF SERVICE

I hereby certify that today I filed with the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, the original Complainant's Provision of Supplemental Authorities for this civil administrative action and that true and accurate copies were issued by U.S. Mail to:

The Honorable Edward J. Kuhlmann  
Administrative Law Judge  
U.S. Environmental Protection Agency  
Mail Code 1900  
401 M Street, S.W.  
Washington, D.C. 20460; and

Stephen P. Samuels, Esq.  
Samuels and Northrop Co., LPA  
Suite 816  
180 East Broad Street  
Columbus, OH 43215



Jeffery M. Trevino  
Associate Regional Counsel



Date